MALAYAN BANKING BHD

v.

YEO SUN TONG

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL J
[SUIT NO: 22-30 OF 1995]
13 JULY 1999

BANKING: *Loan - Recovery - Suit against guarantor - Summary judgment - Whether full particulars of debt pleaded in statement of claim - Failure to particularise debt - Effect - Certificate of conclusiveness - Whether conclusive of the debt due*

CIVIL PROCEDURE: *Pleadings - Statement of claim - Claim for debt due - Whether full particulars of debt to be pleaded - Variation of interest rate - Amount in statement of claim varied with amount in affidavit - Lack of precision - Whether fatal - Certificate of indebtedness - Whether conclusive of plaintiff's claim - Whether could be relied upon without having to plead full particulars of debt*

The plaintiff had granted banking facilities to the first defendant for which the second to the seventh defendants stood guarantors. The plaintiff obtained consent judgment against the first defendant and summary judgment against the second to the fifth defendants. The third defendant appealed and argued that summary judgment ought to be set aside as the plaintiff had not pleaded the full particulars of the debt due, and the statement of claim, therefore, was tainted with lack of precision. It was not disputed that the plaintiff's notice of demand and the affidavit in support of the application for summary judgment had both included a claim for interest due, but the statement of claim (by its para 15) seemed to have excluded interest. The variation in the amount claimed prompted the third defendant to ask for a statement of accounts pertaining to the interest charged, but the request was not entertained by the plaintiff. The third defendant's appeal, in any case, was allowed by the court. The plaintiff appealed and argued that (i) the court may take judicial notice of the notices of variation of base lending rate as advertised by the plaintiff in the newspapers; and (ii) the third defendant was bound by the consent judgment aforesaid, as well as the relevant certificate of indebtedness.

Held:

[1] The third defendant was justified in requesting for the particulars of the variation of the rate of interest. The particulars as requested ought to have been furnished to enable the third defendant to file a proper defence. Such lack of precision in the pleading will not entitle the plaintiff to summary judgment.

[2] Newspaper articles must be proved in accordance with s. 81 of the Evidence Act 1950 and the court cannot take judicial notice of them. In any event, the plaintiff must tender the relevant articles to enable the court to do so, as otherwise the submission made will entail the court in looking for the relevant articles.

[3] The purpose of a certificate of conclusiveness is only to dispense with proof of the debt. However, full particulars of the debt due must be pleaded in the statement of claim. A mere statement of the debt in the statement of claim without condescending to particulars when it is made up of several elements means that the pleading itself is in the nature of statement of conclusiveness.

[3a] The statement of conclusiveness read with the statement of claim must show with clarity the actual debt due for which proof has been dispensed with by the production of the statement. In this case, the statement of claim does not give particulars of the debt nor was it furnished to the third defendant. Such failure to particularise means that the statement of conclusiveness cannot be regarded as being conclusive of the debt.

[4] The consent judgment obtained by the plaintiff against the first defendant ceases to be binding on the third defendant for the same reason as the statement of conclusiveness.

[Appeal dismissed.]

Case(s) referred to:

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 670

Ex parte Young, In re Kitchin [1991] 17 Ch D 668

Oriental Bank Bhd v. Jaafar Sidek Mohd Salam & Ors [1990] 2 CLJ 72

Public Bank Bhd v. Tradikon Sdn Bhd 3 Mallal's Dig 4th edn (1997 Reissue)

Legislation referred to:

Contracts Act 1950, s. 86

For the appellant - Kee Tong Kiak; M/s Nik Hussain & Partners

For the respondent - J Amardas; M/s KP Ng & Amardas

JUDGMENT

Augustine Paul J:

This case involves a claim by the plaintiff for the sum of RM1,364,363.63 arising from a loan given to the first defendant with the second to the seventh defendants as guarantors. The plaintiff obtained a consent judgment against the first defendant and summary judgment against the second to the fifth defendants before the learned senior assistant registrar. The second to the fifth defendants appealed against the order. I dismissed the appeal by the second, fourth and fifth defendants and allowed the appeal by the third defendant. This appeal is by the plaintiff against the order I made with regard to the third defendant.

The facts of the case, as agreed by the parties, are as follows. The plaintiff is a licensed bank and the first defendant is a housing developer. At the material time, the second to the seventh defendants were directors of the first defendant. On or about 6 August 1991, the first defendant applied to the plaintiff for banking facilities for

a) a bridging loan of RM2,000,000; and

b) end financing of RM9,000,000

The plaintiff had agreed to grant the first defendant the said facilities subject to the terms and conditions of the letter of offer dated 11 September 1991. The bridging finance was subject to a yearly review and was to be fully settled two years after the first drawdown or by redemption of each title/lot released/ sold/transferred whichever is earlier.

The first defendant passed a resolution dated 16 September 1991 accepting the said facilities and authorised Mr Eng Song Huat and Mr Ang Kong Peng to "execute the necessary documents and to affix the common seal on the said documents if the need may arise." As security for the said bridging finance of the RM2,000,000 the first defendant created a charge on 10 October 1991 over its property held under Geran No Pendaftaran 1902, Lot No 329, Pekan Klebang Seksyen III, Daerah Melaka Tengah. The said charge was duly registered on 1 November 1991. The relevant clauses of the said charge are as follows:

Clause 1

The chargor(s) will on demand pay to the Bank all sums of money which are now or shall from time to time or at any time hereafter be due and owing by the Chargor(s) solely or jointly with any other persons firms or companies and whether as principal or surety or which the Chargor(s) may be or become liable to the Bank anywhere on banking account … up to an aggregate sum of Malaysian Ringgit two Million (M$2,000,000) only together with interest herein at the rate of two per centum (2%) above the Bank's Base Lending Rate (currently Bank's BLR is at 8% p.a. per annum with monthly rests) (hereinafter referred to as "Prescribed Rate" which expression shall wherever the context so permits include any and such other rate which the Bank may at any time and from time to time stipulate in the manner hereinafter appearing) commission discount and all other banking charges and all costs charges and other expenses which the Bank may charge in respect of any of the matters aforesaid …

And if when the said account or accounts current or otherwise shall be closed either by demand as aforesaid or by the death of the Chargor(s) … a balance shall be owing to the Bank by the Chargor(s) or the personal representatives of the Chargor(s) as the case may be will so long as the same or any part thereof shall remain owing pay to the Bank interest thereon at the Prescribed Rate with monthly rests computed from the time when such balance shall have been ascertained and the Chargor(s) agree(s) that the statement of the Manager, Assistant Manager, Sub-Manager, Accountant or any other Officer of the Bank as to the amount of such balance shall be final and conclusive.

Clause 3

Notwithstanding the provisions relating to the Base Lending Rate of interest of the Bank and/or the percentage of interest imposed above the Base Lending Rate of interest of the Bank as hereinbefore provided, the Bank shall be entitled at any time and from time to time to vary at the discretion of the Bank the Base Lending Rate of interest of the Bank and/or such percentage of interest imposed above the Base Lending Rate of the Bank in the manner hereinafter set out:

(i) in respect of the Base Lending Rate of interest of the Bank by placing in one issue of a daily national newspaper a general Notice of change of the Base Lending Rate interest of the Bank addressed to the public generally.

Clause 67

In the event that Bank shall demand repayment of the facility, or, the amount outstanding on the facility shall exceed the limit of the facility … the Chargor(s) shall be liable, without prejudice to any other right or remedy of the Bank, to pay additional interest upon the amount outstanding and unpaid upon demand for repayment of the facility, or, the amount in excess of the limit of the facility, as the case may be, at the rate of one per centum (1%) per annum, or such other higher rate as shall be imposed by the Bank at any time and from time to time, above the prescribed rate of interest.

Additional interest shall accrue from day to day (both before and after any demand for repayment of the facility or any judgment in respect thereof) and remaining unpaid shall be debited to the account of the Chargor(s) at the end of every calendar month and be liable thereupon to additional interest as herein provided.

The second to the seventh defendants executed a Letter of Guarantee dated 30 December 1991 guaranteeing payment of the sums due under the said bridging finance facility. The relevant clauses are as follows:

Preamble

In consideration of your having opened opening or continuing an account with and having made making or continuing to make advances or otherwise giving credit or accommodation or granting time to MESSRS. JEURO DEVELOPMENTS SDN. BHD. … at my/our request for as long as you may at your sole discretion deem fit I/we … the undersigned hereby jointly and severally agree with and guarantee you as follows:

Clause 1 I/We will pay you on demand:

(i) all moneys which now are or may during the operation of this Guarantee be owing to you from the Customer or remain unpaid on the general balance of the Customer's account with you anywhere and on any account whatsoever whether from the Customer alone or from the Customer jointly with or as surety for any other person or persons or for any firm or company including advances overdrafts discounts bills or notes held by you on or in respect of which the Customer may be or have been liable to you in any manner together with commissions and other ordinary banking expenses including interest at such rate as may be from time to time be agreed between the Customer and you with monthly rests although the relation of banker and customer may have ceased:

(iv) all costs charges and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money or amounts hereby guaranteed.

Clause 5 This Guarantee shall be a continuing guarantee to you to the extent of Ringgit Two Million only ($2,000,000) for the purpose of securing not merely an equivalent amount but (subject always to the said limit of Ringgit 2,000,000.00) the whole of the moneys ... general balance in clause 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest on the sum claimable from me/us at the rate which is levied on the Customer from time to time from the date of my/our receiving demand for payment thereof.

Clause 6 This Guarantee shall be without prejudice to and shall not be affected nor shall I/we or any of us be released exonerated by any of the matters following:-

(ii) the variation exchange renewal release or modification of any such securities or the refusal or neglect to complete enforce or assign any judgment specially or other security or instrument negotiable or otherwise and whether satisfied by payment or not:

(iii) any time given or extended to the Customer and/or any other person or persons including myself/any of ourselves and the parties to any negotiable or other security instrument guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the Customer and/or any other person or persons whether with or without consent or notice to me/us:

(iv) the continuing and/or the opening of any other account or accounts current or otherwise with the Customer at any of your branch or branches: and

(v) the granting of any other banking facility or facilities to the Customer and or variation of any existing banking facilities granted to the Customer by way of (but not limited to) substitution addition increase or reduction whatsoever.

Clause 8 This Guarantee shall not be determined or affected by the death or insanity of myself or any one or more of us but shall in all respects and for all purposes be binding and operative until determined as to future transactions by fourteen (14) days notice in writing given to you by me/us or any one of us by the personal representatives of us who may be dead or in case of insanity of any of us by the person legally entitled to represent the insane person. During the pendency of such notice you may subject always to the aforesaid limit of my/our liability hereunder fulfil any requirements of the Customer based in agreements express or implied prior to the receipt of such notice and you may afford the Customer such further accommodation as you would have done had you not received such notice and any moneys thereby due or remaining unpaid at or after the expiration of such notice shall form part of the aforesaid general balance.

Clause 11 Any admission or acknowledgement in writing by the Customer or any person authorised by the Customer of the amount of indebtedness of the Customer to you and any judgment recovered by you against the Customer in respect of such indebtedness shall be binding and conclusive against me/us. A statement signed by your

manager, sub-manager, secretary or any one of your officer as to the monies and liabilities for the time being due or incurred to you from or by the Customer shall be final and conclusive evidence against me/us for all purposes including legal proceedings.

Clause 12

Until and unless determined as herein this Guarantee provided, my/our guarantee herein shall be a continuing guarantee notwithstanding that the Customer may at any time or times cease to be indebted to you for any period or periods and notwithstanding any settlement of account or accounts or otherwise.

Clause 15

I/We hereby agree that you shall be at liberty without any further consent from me/us and without thereby affecting my/our liability under this Guarantee at any time to determine enlarge or vary any credit to the Customer. You may enforce this Guarantee against me/us at any time notwithstanding that any bills or other instruments covered by it may be in circulation or outstanding and include the amount of the same or any of them in the said general balance or not at your option and this Guarantee shall not be determinable by me/us or my/our personal representatives except on the terms of our making full provision up to the limit of my/our Guarantee for any then outstanding liabilities or obligations on your part and on the Customer's account.

Clause 17

As a separate and independent stipulation, I/we agree that any sum or sums of money which may not be recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the Customer or by any other fact or circumstance and whether known to you or not or not shall nevertheless be recoverable from me/us or each of us as sole or principal debtors and shall be paid by me/us on demand.

The first defendant then opened a project account No 60051-4 with the plaintiff. A director's resolution was passed on 9 January 1992 for this purpose. The said bridging finance was utilised by the first defendant. On 30 July 1992, the plaintiff wrote to the first defendant stating that the aggregate redemption sum due was RM168,000 and it would be reduced from the drawing limit of RM760,412.90 to RM592,412.90 with effect from 31 July 1992. On 21 August 1992 the plaintiff wrote to the first defendant informing that the total redemption sum for 108 units was RM1,816,000 and would be reduced from the bridging finance of RM2,000,000. The said facility was to be reduced to RM184,000. On 21 August 1992, the first defendant wrote to the plaintiff on the question of redemption and appealed to the plaintiff to re-schedule the period of redemption. On 25 May 1993 the plaintiff informed the first defendant of its agreement to reinstate the bridging finance subject to the terms and conditions stated in the letter dated 25 May 1993. The first defendant appealed on this arrangement by a letter dated 7 June 1993. Finally the plaintiff agreed to reinstate the bridging finance to RM2,000,000 subject to the revised repayment terms and conditions, *inter alia*, as follows:

1) Quarterly repayment of RM250,000 (effective from 30 September 1993) and to be fully settled by 30 June 1994; and

2) Quarterly deductions (effective 30 September 1993) from progress claims received under stage 2(f) and stage 3 of the stipulated schedule of progress payments.

By a letter dated 7 October 1993, the plaintiff informed the first defendant that the said facility was ready for use. The said bridging loan was reduced to zero following the terms and conditions of the letter dated 28 August 1993. The first defendant again appealed for another reinstatement of the said facility. By a letter dated 5 May 1994, the plaintiff agreed to reinstate the said bridging finance subject to the terms and conditions therein stated. The terms, *inter alia*, provided that:

a) the plaintiff agreed to reinstate the said facility of RM2,000,000; and

b) the bridging finance is to be fully settled by September 1994 or upon release of the last 20% progress claims.

The first defendant accepted the terms and passed a resolution dated 11 May 1994 to that effect. The said facility was utilised by the first defendant. By a letter dated 1 September 1994, the plaintiff reminded the first defendant that the said facility was to be fully settled by September 1994 and advised the first defendant to make arrangements to settle the overdraft outstanding in the account on or before 30 September 1994 as the overdraft limit will be fully

reduced on 1 October 1994. On 3 October 1994, the plaintiff informed the first defendant that the overdraft limit had been fully reduced and the amount owing as at 2 October 1994 was RM1,332,199.52. The plaintiff then demanded for payment of the sum of RM1,342,933.62 due and owing as at 8 November 1994 by letter dated 8 November 1994. By letters dated 9 January 1995, the plaintiff, through its solicitors, demanded payment of the sum of RM1,364,363.63 due as at 7 January 1995 against all the defendants. The plaintiff had also issued a certificate of indebtedness certifying that the sum of RM1,364,363.63 was due and owing to the plaintiff as at 7 January 1995. The plaintiff had obtained a consent judgment on 8 November 1996 against the first defendant.

The parties agreed that the outcome of the appeal depended on a resolution of the following issues.

1. Whether the original guarantee has been satisfied.
2. Whether there was a proper resolution in respect of the reinstatement of the facility.
3. Whether the third defendant was discharged by virtue of the variation in the facility.
4. Whether notice under s. 86 of the Contracts Act 1950 ought to have been given to the third defendant.
5. The extent of liability of the third defendant in view of the preamble to the guarantee.
6. Whether the consent judgment against the first defendant is binding and conclusive on the other defendants.
7. Whether notice of change of the Base Lending Rate is in accordance with cl. 3 of the charge document.
8. Whether the plaintiff must have given a breakdown of the total amount due.

Of all the issues agreed to by the parties for determination what, to my mind, are pertinent are the last two relating to interest. Pursuant to cl. 3 of the charge annexure the plaintiff is entitled to vary its Base Lending Rate of interest and/or such percentage of interest and/or such percentage of interest imposed above its Base Lending Rate. The clause reads as follows:

3. Notwithstanding the provisions relating to the Base Lending Rate of the Bank and/or the percentage of interest imposed above the Base Lending Rate of interest of the Bank as hereinbefore provided, the Bank shall be entitled at any time and from time to time to vary at the discretion of the Bank the Base Lending Rate of interest of the Bank and/or such percentage of interest imposed above the Base Lending Rate of the Bank in the manner hereinafter set out:

(i) in respect of the Base Lending Rate of interest of the Bank by placing in one issue of a daily national newspaper a general Notice of change of the Base Lending Rate of interest of the Bank addressed to the public generally.

(ii) In respect of the percentage of interest imposed above the Base Lending Rate of interest of the Bank by serving a Notice in writing on the Chargor(s) of the change in percentage of interest imposed above the Base Lending Rate of interest of the Bank. Such Notice shall be deemed to have sufficiently served on the Chargor(s) if sent by ordinary mail to the usual or last known place of residence or to the address abovestated of the Chargor(s).

Provided always that the effective date of the change of the Base Lending Rate of interest of the Bank and/or the percentage of interest imposed above the Base Lending Rate of interest of the Bank shall be the date specified in the Notice.

With regard to the plaintiff's claim against the third defendant the latter was sent a notice of demand dated 9 January 1995 the material part of which reads as follows:

We have been instructed by our clients that the Borrrower has defaulted in the repayment of said facility and the interest accruing thereon and that as at 6th January 1995 there was a total outstanding sum of RM1,364,363.63 due in respect of the facility.

This clearly shows that the outstanding sum includes a claim for interest due. With regard to the total amount claimed para. 15 of the statement of claim reads as follows:

The Plaintiff's claim against all the Defendants is for the sum of RM1,362,363.63 as at 7.1.95 being the balance of loan sum under the said loan agreement.

This would appear to imply that the amount claimed does not include interest as the reference is to the balance of "… loan sum …" In this regard para. 26 of the affidavit in support of the application for summary judgment says that:

Saya sesungguhnya menyatakan bahawa jumlah yang terhutang setakat 8.11.94 adalah sebanyak RM1,342,933.62.

A reference to the total sum due in para. 26 would include a claim for interest. In view of the lack of precision as to the amount claimed in the statement of claim the third defendant justifiably affirmed in paras 8 and 9 of his affidavit in reply to the plaintiff's application for summary judgment as follows:

> 8. Saya merujuk kepada perenggan 3 affidavit tersebut dan ingin mengatakan bahawa walaupun Plaintif telah mengatakan jumlah yang masih dihutang tetapi beliau tidak menunjukkan bagaimana jumlah sebanyak RM1,364,363.63 diperolehi, memandangkan kadar asas pinjaman (selepas ini disebut sebagai BLR) telah menukar beberapa kali dari tarikh pinjaman diberi sehingga hari ini.
>
> 9. Saya melalui peguam saya telah memohon untuk butir akaun daripada peguam Plaintif tetapi butir-butir tersebut tidak diberi oleh Plaintif dan tidak ada jawapan daripada peguam Plaintif. Bersama-sama ini saya lampirkan surat tersebut yang ditanda sebagai 'YST 3'.

By exh. "YST 3" dated 18 July 1995 annexed to the affidavit referred to above the third defendant had asked for, *inter alia*, a statement of accounts setting out the interest charged from time to time in order to enable him to file his statement of defence. The plaintiff did not respond to this letter. In his submission before me learned counsel for the plaintiff submitted that the variation of the rate of interest is valid. I agree with that proposition. But what the third defendant wanted was particulars of the variation. This ought to have been furnished. With regard to this objection learned counsel for the plaintiff said in his written submission:

> In any event, my Lord, your Lordship may take judicial notice of the notices of variation of Base Lending Rate advertised in the newspapers by the Plaintiff bank:

Newspaper articles must be proved in accordance with s. 81 of the Evidence Act 1950 and the court cannot take judicial notice of them. In any event the plaintiff must tender the relevant articles to enable the court to do so as otherwise the submission made will entail the court in looking for the relevant articles. I therefore rejected the plaintiff's argument and held that the particulars requested by the third defendant ought to have been furnished to enable him to file a proper defence. Such lack of precision in the pleading will not entitle the plaintiff to summary judgment. In *Public Bank Bhd v Tradikon Sdn Bhd 3 Mallal's Dig* 4th edn (1997 Reissue) para 2267 Zakaria Yatim J (as he then was) said that as there was no evidence to show whether the interest charged was that as specified in the letter of offer or at a lesser or higher rate it was not a plain and obvious case for summary judgment. This is therefore not a plain and obvious case to enter summary judgment against the third defendant.

This raises the further question of whether the consent judgment obtained by the plaintiff against the first defendant and the statement showing the amount of indebtedness is conclusive of the plaintiff's claim against the third defendant as provided by cl. 11 of the guarantee agreement. I shall first deal with the statement of conclusiveness. The law relating to a statement of conclusiveness has been neatly summarised by the Court of Appeal in *Chen Heng Ping @ Tian Seow Hock & 5 Ors v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 670 where Mahadev Shanker JCA in writing for the court said at pp. 694 – 695:

> Before us Counsel for the guarantors confined himself to the fourth headnote of *Oriental Bank Bhd v. Jaafar Siden b Mohd Salam & 2 Others* [1990] 2 CLJ 72, and read us the passage in Y.A. Siti Norma Yaakob's judgment at p 74. A proper understanding of the passage requires a consideration of the previous paragraphs but for the present purpose it will suffice if we reproduce the passage read and the paragraph immediately preceding it:
>
> > There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7% per annum in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as is now claimed.
> >
> > In the light of such apparent likelihood of the 1st defendant's account being incorrect, the application cannot be intended to have the effect of circumventing cl. 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the 1st defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under cl. 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.
>
> We were also referred to *Bank of Commerce (M) Bhd v. Tan Boon Soon* [1995] 1 AMR 156 at p. 168 where Y.A. Selventhiranathan referred to the cases just cited and then said:
>
> > Similarly, in this case, although the second defendant had disputed the sum claimed by alleging that no credit had been given for the realization of the securities given and there was evidence to this effect in the widely divergent sums claimed from the first defendant as compared with that from the second defendant, yet the plaintiff steadfastly refused to show how the different sums were arrived at, claiming that it was so privileged under the guarantee. With respect, this cannot be the position in law. Otherwise the court would be lending itself to even the making of false or exaggerated claims by plaintiffs by allowing non-accountability clauses in guarantees to be abused to the extent of the plaintiffs seeking total refuge behind their wording.

> In his judgment Shaun Chan A.R. referred to 15 *Halbury's Laws of England* (3rd Edn.) para 278. In the present context that passage should be understood to mean that even though the guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, it does not prevent the guarantors from adducing evidence to show that there is a manifest error on the face of the certificate or fraud. The initial onus is on the guarantors. The court is not bound by the contractual provision in the guarantee. When evidence is produced which casts doubts on the accuracy of the certificate it should not accept the certificate as conclusive. It is then for the plaintiff to prove the quantum of the debt claimed in accordance with the requirements of the Evidence Act.

In my opinion the purpose of a certificate of conclusiveness is only to dispense with prove of the debt. However, full particulars of the debt due must be pleaded in the statement of claim. A mere statement of the debt due in the statement of claim without condescending to particulars when it is made up of several elements will mean that the pleading itself is in the nature of a statement of conclusiveness. The statement of conclusiveness read with the statement of claim must show with clarity the actual debt due for which proof has been dispensed with by the production of the statement. In this case the statement of claim does not give particulars of the debt nor was it furnished to the third defendant despite his request. The case of *Oriental Bank Bhd v. Jaafar Sidek b Mohd Salam & 2 Others* [1990] 2 CLJ 72 shows that variations in the rate of interest may lead to a likelihood of the account being incorrect. In the circumstances it is my view that the failure by the plaintiff to particularise the debt due in the statement of claim means that the statement of conclusiveness cannot be regarded as being conclusive of the debt due. That leads to a consideration of the effect of the consent judgment obtained by the plaintiff against the first defendant with regard to the liability of the third defendant. In contending that the third defendant is bound by the judgment learned counsel for the plaintiff referred to *Ex-parte Young, In re Kitchin* [1991] 17 Ch D 668 where James LJ said at pp. 671 – 672:

> It is perfectly clear that in an action against a surety the amount of the damage cannot be proved by any admissions of the principal. No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay. If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it. But it would be a strong thing to say that he has done so, unless you find that he has said so in so many words. The arbitration is a proceeding to which he is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used,

> or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained.

In my opinion the consent judgment obtained by the plaintiff against the first defendant ceases to be binding on the third defendant for the same reason as the statement of conclusiveness.

a

b

This page is intentionally left blank

c

d

e

f

g

h

i